

No. A07-2438

**STATE OF MINNESOTA
IN COURT OF APPEALS**

City of Waite Park, petitioner,

Respondent,

Richard G. Heid, et al., intervenors,

Respondents,

vs.

Minnesota Office of Administrative Hearings,

Appellant.

RESPONDENTS RICHARD G. HEID AND ROBERT P. HERGES' BRIEF

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Statement of the Legal Issues

I. Intervenor's Entitlement to Damages

Under court rules, anyone may intervene in a civil action if (1) they claim an interest relating to the property or transaction which is the subject of the action; (2) they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest; and (3) their interest is not adequately represented by existing parties. Respondents Richard G. Heid and Robert P. Herges properly intervened in this action.

May a party that properly intervened in support of a petition for a writ of mandamus recover damages sustained under Minn. Stat. § 586.09?

The district court held in the affirmative, finding that Respondents are plaintiffs, were given judgment, and are entitled to pursue a claim for damages pursuant to Minn. Stat. § 586.09. Respondents assert that the decision of the district court was correct.

Most apposite cases and statutory provisions: Nationwide Corp. v. Nw. Nat'l Life Ins. Co., 251 Minn. 255, 87 N.W.2d 671 (1958); Wohlwend v. J. I. Case Threshing Mach. Co., 42 Minn. 500, 44 N.W. 517 (1890); Waite Park v. Office of Administrative Hearings, 2006 WL 1985457 (Minn. Ct. App. July 18, 2006); Minn. Stat. § 586.09; and Minn. R. Civ. P. 24.01.

II. Immunity

In a mandamus action, no party is immune from liability for damages. Further, a state governmental official or entity does not have statutory or common law immunity for

activities that are absolute, certain, and imperative, involving the execution of a specific duty arising from fixed and designated facts and not of a judicial or quasi-judicial nature. Appellant Minnesota Office of Administrative Hearings had a duty required by law to order annexation of property owned by Respondents Richard G. Heid and Robert P. Herges to the City of Waite Park without a hearing in 2005.

Is a state agency immune from liability for damages under Minn. Stat. § 586.09 when judgment on a writ of mandamus is entered against it compelling it to perform its ministerial duty to order annexation under Minn. Stat. § 414.0325, subd. 1?

The district court held in the affirmative, finding that the Appellant is liable for damages sustained in a mandamus action when it failed to order annexation as required by Minn. Stat. § 414.0325, subd. 1 and it did not have any judicial, quasi-judicial, or discretionary authority. Respondents assert that the decision of the district court was correct.

Most apposite cases and statutory provision: Sletten v. Ramsey County, 675 N.W.2d 291 (Minn. 2004); Nationwide Corp. v. Nw. Nat'l Life Ins. Co., 251 Minn. 255, 87 N.W.2d 671 (1958) ; Villareal v. Independent School District #659, 505 N.W.2d 72 (Minn. Ct. App. 1993); Waite Park v. Office of Administrative Hearings, 2006 WL 1985457 (Minn. Ct. App. July 18, 2006); and Minn. Stat. § 586.09.

III. Jurisdiction

Minnesota law provides that a party who is given judgment in a mandamus action shall recover the damage sustained, together with costs and disbursements. Proof of

these damages under the district court's judgment may be made at a time fixed by the court. Respondents Richard G. Heid and Robert P. Herges submitted their Claim for Damages and Interest at the direction of Ramsey County District Court following judgment by the district court on this Court's affirmance of the writ of mandamus.

Does the district court retain jurisdiction over a claim for damages pursuant to Minn. Stat. § 586.09 following judgment on a writ of mandamus and affirmance of such judgment by this Court?

The district court held in the affirmative, finding that it had jurisdiction over Respondents' Amended Claim for Damages and Interest. Respondents assert that the decision of the district court was correct.

Most apposite cases and statutory provisions: Nationwide Corp. v. Nw. Nat'l Life Ins. Co., 251 Minn. 255, 87 N.W.2d 671 (1958) ; State ex rel. Matthews v. Weber, 31 Minn. 211, 17 N.W. 339 (1883); Waite Park v. Office of Administrative Hearings, 2006 WL 1985457 (Minn. Ct. App. July 18, 2006); and Minn. Stat. § § 586.01, 09.

Statement of the Case

This is an appeal of the Ramsey County District Court (hereinafter the "District Court"), the Honorable Teresa R. Warner's Order, dated December 3, 2007, denying Appellant Minnesota Office of Administrative Hearings' (hereinafter "OAH") motion to dismiss or for summary judgment on Respondents Richard G. Heid and Robert P. Herges' (hereinafter "Heid and Herges") Amended Claim for Damages and Interest. (Appellant's Appendix (hereinafter "App. A.") at A3-15; 230-36). The District Court

held that it had jurisdiction over Heid and Herges' claim for damages, Heid and Herges were entitled to pursue their claim, and OAH is not immune from such claim. Id.

I. The District Court issues a writ of mandamus requiring OAH to immediately order annexation of Heid and Herges' property to the City of Waite Park.

On April 29, 2005, the City of Waite Park (hereinafter "Waite Park") filed a Verified Petition for Alternative Writ of Mandamus (hereinafter "Mandamus Petition") with the District Court requesting that a writ of mandamus be issued. (App. A. at A16-35). The Mandamus Petition requested that OAH be directed and compelled to meet its statutory obligation to immediately order annexation of property owned by Heid and Herges (hereinafter "Heid Herges Property") to Waite Park as provided in the Joint Resolution for Orderly Annexation between St. Joseph Township (hereinafter the "Township") and Waite Park (hereinafter "Orderly Annexation Agreement") and a resolution adopted by the Waite Park City Council approving the annexation of the Heid Herges Property (hereinafter "Annexation Resolution"). (App. A. at A74-82, 127-29).

The District Court issued an Order to Show Cause on the Mandamus Petition (hereinafter the "Show Cause Order") on June 1, 2005, commanding OAH to show cause before the District Court at a hearing why OAH had not ordered the annexation of the Heid Herges Property to Waite Park or, in the alternative, to order the annexation of the property to Waite Park. (Respondents Richard G. Heid and Robert P. Herges' Appendix (hereinafter "Resp. A.") at RA1-8).

On June 30, 2005, Heid and Herges filed a Notice of Intervention and Intervenors' Verified Pleading and Statement of Reasons for Intervention with the District Court

seeking to intervene as parties in the mandamus proceedings in support of the Mandamus Petition. (App. A. at A36-46). Heid and Herges sought to intervene on the grounds that they are owners of the Heid Herges Property and that such area requires municipal services from Waite Park in order for their proposed urban residential development to proceed. Id. Such services were available from Waite Park upon annexation of the property to Waite Park. Id.

A show cause hearing was held before the District Court on July 14, 2005, pursuant to the Show Cause Order.

The District Court granted the Writ of Mandamus (hereinafter the “Writ of Mandamus”) on September 6, 2005 and ordered OAH to issue an order immediately annexing the Heid Herges Property from the Township to Waite Park in accordance with the Orderly Annexation Agreement, the Annexation Resolution, and Minn. Stat. § 414.0325. (App. A. at A158, 167). In this order, the District Court concluded, among other things, that:

[OAH] failed to perform an official duty clearly imposed by law when [it] did not order the annexation of the affected area within thirty days of Waite Park’s submission of a Resolution for Orderly Annexation.

...

Intervenors, Heid and Herges have been unable to develop their property as anticipated.

...

[T]his Court has ruled that, as a matter of law, the administrative hearings Petitioner[] Waite Park seeks relief from should not have been ordered.

Id. at A166-67.

On September 12, 2005, the District Court issued its Order Granting the Writ of Mandamus. (App. A. at A168). Two days later, it issued the Writ of Mandamus, which ordered OAH to “immediately” issue an order for annexation of the Heid Herges Property upon receipt of the Writ of Mandamus in accordance with the Orderly Annexation Agreement, the Annexation Resolution, and Minn. Stat. § 414.0325. (App. A. at A169-70). Waite Park served the Writ of Mandamus on OAH the same day.

II. All enforcement proceedings on the Writ of Mandamus were stayed pending the appeal by OAH.

On September 22, 2005, OAH commenced an appeal of the District Court’s Order Granting Writ of Mandamus to this Court (hereinafter “OAH Appeal I”). (App. A. at A170(a)-(b)). Due to OAH’s appeal, the District Court ordered a stay of enforcement of the Writ of Mandamus pending such appeal on October 11, 2005. (App. A. at A171-75). In the stay order, the District Court held that damages resulting from the stay could be readily determined. (App. A. at A175).

One day following such order, Judgment was entered on the Order Granting the Writ of Mandamus. (App. A. at A179-80).

Pursuant to a motion by Waite Park, the District Court ordered the District Court Administrator to tax certain costs and disbursements in this case in favor of Waite Park against OAH based, in part, on Minn. Stat. § 586.09 in February, 2006. (App. A. at A209-212). In response to Waite Park’s motion, OAH asserted that it was immune from paying costs and disbursements. (Respondent’s Response to Petitioner’s Motion for Review and Amendment of Taxation and Costs and Disbursements, dated December 2,

2005). The District Court held that OAH was not immune and that Waite Park was entitled to costs and disbursements under Minn. Stat. § 586.09. (App. A. at A209-12).

III. OAH orders annexation following this Court's affirmance of the Writ of Mandamus.

On November 1, 2005, this Court ordered that review on OAH Appeal I was extended to the District Court's October 12, 2005 judgment. (App. A. at A206-08).

Following oral argument and briefing, this Court affirmed the District Court's Order, dated September 6, 2005, and that court's Order Granting the Writ of Mandamus on July 18, 2006. (App. A. at A214-220). In affirming such orders, this Court held as follows:

Because the resolution for annexation of the property at issue was properly submitted and adhered the provisions of the joint resolution and Minn. Stat. § 414.0325, the district court properly found that OAH had a legal duty to order the annexation of the property. OAH could review and comment on the resolution for the property at issue, but it was required to order the annexation within 30 days.

...

OAH prolonged the process causing unnecessary costs, hindered the development of the property and growth of the City, affected the resale value of the property.

(App. A. at A219-20).

This Court entered judgment for costs and disbursements against OAH in favor of Waite Park in OAH Appeal I on October 12, 2006. (Resp. A. at RA9-10).

IV. Heid and Herges submit their Claim for Damages and Interest.

In early October, 2006, counsel for Heid and Herges (hereinafter "Heid and Herges' Counsel") contacted the Law Clerk to the Honorable Teresa R. Warner

(hereinafter "Judge Warner") and (1) informed him that Heid and Herges intended to seek a claim for damages in this matter; and (2) inquired of him the procedure to pursue the claim. (Affidavit of Brandon M. Fitzsimmons In Opposition to Respondent's Motion to Dismiss or for Summary Judgment, dated September 28, 2007, ¶ 3). Following that conversation, the Law Clerk contacted Heid and Herges' Counsel and informed him that Judge Warner directed him to informally submit documentation of the damages claimed and authority for the damages and then a hearing would be scheduled on the claim. Id.

On October 12, 2006, Heid and Herges filed their Claim for Damages and Interest with the District Court, along with affidavits and exhibits in support of each item of damages claimed, requesting an award of damages and interest. (App. A. at A223-29).

The District Court thereafter issued a Notice of Hearing, dated November 2, 2006, scheduling a hearing on Heid and Herges' claim for damages.

In response, OAH submitted its 15 page Memorandum in Opposition to Intervenor's Claim for Damages and Interest, dated November 22, 2006, to the District Court, along with exhibits, in which it asserted substantially similar arguments on the District Court's jurisdiction, Heid and Herges' entitlement to damages, and OAH's alleged immunity as it does in this appeal. (App. A. at A237-51).

In reply, Heid and Herges submitted their 33 page Intervenor's Memorandum in Reply to Respondent's Memorandum in Opposition to Intervenor's Claim for Damages and Interest, dated December 8, 2006, to the District Court rebutting OAH's arguments on jurisdiction and alleged immunity, along with an affidavit and exhibits. Because of

additional payments incurred by Heid and Herges resulting from OAH's delay in ordering annexation and a clerical error in the request for prejudgment interest, Heid and Herges also submitted the Amended Claim for Damages and Interest on the same day. (App. A. at A230-36).

The District Court held a hearing on the Amended Claim for Damages and Interest on December 14, 2006. Counsel for the parties, after fully briefing the arguments, presented oral argument and answered questions from Judge Warner at the hearing. The hearing lasted over one and one-half hours.

On February 27, 2007, the District Court ordered, in part, that:

1. [Heid and Herges'] claim for damages is **GRANTED**, to the extent that [Heid and Herges] have established they are entitled to pursue a claim for damages; [and]
2. An award for damages, if any, will be made after both parties have a full opportunity to be heard[.]

(App. A. at A255-60).

In the memorandum attached to the Order, the District Court held that:

To prevent Intervenors from now seeking damages is contrary to this Court's two previous Orders and the Court of Appeals July 11, 2006 Order.

...

Intervenors have established an entitlement to a claim for damages. A further hearing is necessary in order to address the amount of damages, if any, to be awarded to Intervenors.

(App. A. at A260).

V. The District Court denies OAH's summary judgment motion.

The parties held a scheduling conference on March 30, 2007 in Judge Warner's Chambers off the record. The District Court thereafter scheduled a trial on the Amended Claim for Damages and Interest to commence on January 28, 2008. See (App. A. at A252-54).

Following discovery and mediation, OAH commenced its summary judgment motion on September 11, 2007. (App. A. at A261-63). The parties thereafter submitted memoranda and a hearing was held before Judge Warner on OAH's summary judgment motion on October 12, 2007.

The District Court denied OAH's motion to dismiss or for summary judgment on Heid and Herges' Amended Claim for Damages and Interest by an Order, dated December 3, 2007. (App. A. at A3-15). The District Court held that it had jurisdiction over Heid and Herges' claim for damages; Heid and Herges were entitled to pursue their claim; and OAH is not immune from such claim. Id.

Heid and Herges received OAH's Statement of the Case and Notice of Appeal to Court of Appeals on December 27, 2007 appealing the District Court's denial of its motion to dismiss and for summary judgment. (App. A. at A1-2).

Statement of the Facts

I. The Heid Herges Property is acquired for development.

Regional Land & Holding, LLC (hereinafter "Regional Land Holding") acquired the Heid Herges Property in July, 2004. (App. A. at A153-55). Regional Land Holding

owns 100% of the parcels in the Heid Herges Property, which consists of approximately 135.72 acres. Id. Heid and Herges own 100% of Regional Land Holding in equal shares, hold all offices of the company, are authorized to execute all documents necessary to purchase and/or sell real estate, and may individually or collectively bind the company as the only officers in the company. Id.

Heid and Herges acquired the Heid Herges Property for the purposes of urban or suburban residential development, which requires municipal services from Waite Park. (App. A. at A39-40). To receive such services, the Heid Herges Property had to be annexed to Waite Park. Id. Thus, Heid and Herges relied upon annexation to Waite Park to occur pursuant to the Orderly Annexation Agreement and Minn. Stat. § 414.0325. Id.

II. Waite Park properly initiates annexation of the Heid Herges Property requiring OAH to order annexation within 30 days.

The Heid Herges Property was located in an area designated for orderly annexation pursuant to the Orderly Annexation Agreement, which provides for the conditions under which Waite Park may annex land within the area. (App. A. at A74-82). The Orderly Annexation Agreement provides, in relevant part:

The Town and City mutually agree and state that this Joint Resolution and Agreement sets forth all the conditions for annexation of the areas designated, and that no consideration by [OAH] is necessary. [OAH] may review and comment, but shall, within thirty (30) days, order the annexation in accordance with the terms of this Joint Resolution.

(App. A. at A74).

Heid and Herges petitioned the Waite Park City Council on December 17, 2004 for annexation (“Petition for Annexation”) of the Heid Herges Property to Waite Park. (Resp. A. at RA12).

In response to the Petition for Annexation, Waite Park adopted the Annexation Resolution approving the annexation of the Heid Herges Property. (App. A. at A127-29). The resolution included a provision that restated the above-quoted “review and comment” language from the Orderly Annexation Agreement. (App. A. at A127). Waite Park initiated annexation of the Heid Herges Property on January 11, 2005 by submitting the Annexation Resolution and corresponding information to OAH. (Resp. A. at RA11-22).

OAH was required to order annexation of the Heid Herges Property to Waite Park no later than February 10, 2005 pursuant to (1) the Orderly Annexation Agreement; (2) the Annexation Resolution; and (3) Minn. Stat. § 414.0325, subd. 1. OAH failed to order as such.

III. Without any authority and contrary to law, OAH orders a hearing on the Annexation Resolution.

On February 11, 2005, the Executive Director of OAH-Municipal Boundary Adjustments Office (hereinafter “OAH-MBAO”) ordered a hearing on the Annexation Resolution contrary to the Orderly Annexation Agreement and Minn. Stat. § 414.0325, subd. 1(g), which restricts OAH’s jurisdiction over the agreement and resolution to only “review and comment” on an annexation initiated by Waite Park. (Resp. A. at RA23-24).

Three days later, OAH received a letter from the Town Clerk of the Township objecting to the annexation initiated by Waite Park. (App. A. at A131-32).

OAH then opened the hearing on March 3, 2005, on the Annexation Resolution and continued the hearing to an indefinite date. (App. A. at A133-35).

IV. The parties attempt to resolve the matter without litigation.

On March 24, 2005, Waite Park's attorney submitted a letter to OAH-MBAO requesting that it reconsider its hearing order and instead order the annexation of the Heid Herges Property in accordance with the terms and conditions of the Orderly Annexation Agreement. (App. A. at 136-39). During March, 2005, Waite Park and the Township voluntarily held three joint meetings to consider and discuss the annexation of the Heid Herges Property to Waite Park. See Id.

On March 31, 2005, Waite Park's attorney submitted another letter to the OAH-MBAO providing it with an update on the meetings between Waite Park and the Township in regards to the annexation of the Heid Herges Property and to again request that it order the annexation of it in accordance with the applicable statute, agreement, and resolution. (Affidavit of Shauna Johnson, dated April 21, 2005, Exhibit (hereinafter "Exh.") 13).

One week later, Heid and Herges' attorney submitted a letter to OAH-MBAO also requesting that it order annexation of the Heid Herges Property in accordance with the same. See Id., Exh. 14.

V. OAH further delays ordering annexation during the mandamus proceedings resulting in continuing damages to Heid and Herges.

Following the commencement of the mandamus proceedings in April, 2005, OAH issued a letter the following month denying what it asserted was Waite Park's "request for reconsideration" on OAH's hearing order on the Annexation Resolution. (App. A. at A65-139). This letter was also filed with the District Court and served upon the parties. Id. In the letter, OAH ordered Waite Park and the Township to either "enter into an agreement to mediate the issues in dispute between them" or OAH would refer the matter to the Chief Administrative Law Judge for a contested case hearing. Id. at A72. OAH took the above actions contrary to provisions in Minnesota Statutes, section 414.0325, subd. 1 (g) and the Orderly Annexation Agreement, which do not require nor allow OAH to order a hearing, and instead make the order of annexation mandatory in this case.

Once the District Court ordered OAH to order annexation of the Heid Herges Property to Waite Park without a hearing and this Court affirmed such order, OAH ordered annexation of the Heid Herges Property to Waite Park pursuant to the same, the Orderly Annexation Agreement, the Annexation Resolution, and Minn. Stat. § 414.0325 on August 2, 2006. (App. A. at A221-22). OAH issued its order for annexation nearly one and one-half years after it was legally and contractually required to order as such.

Heid and Herges sustained damages as a result of and caused by OAH's delay in ordering annexation, which the District Court's Order Granting the Writ of Mandamus commanded OAH to do and this Court affirmed, including a diminution in the value of the Heid Herges Property; costs futilely expended in preparation for development of the

Heid Herges Property as OAH's delay in ordering annexation has resulted in making the development of the property unfeasible; and continuing expenses attributed to OAH's frustration, delay, and interference with Heid and Herges' development and resale plans. See (App. A. at A223-36).

Summary of Argument

The evidence and decisions of the District Court and this Court clearly demonstrate that (1) OAH had a legal, ministerial duty to order annexation of the Heid Herges Property in February of 2005 based on the circumstances; (2) the District Court issued and this Court affirmed an order granting a writ of mandamus that required OAH to order as such; (3) Heid and Herges sustained and continue to sustain damages as a result of OAH's failure to order the annexation until nearly one and one-half years after it was required to do so; (4) the District Court has jurisdiction over Heid and Herges' Amended Claim for Damages and Interest, which was submitted following this Court's affirmance of the writ of mandamus; (5) the procedure established by the District Court for awarding and assessing damages is fair, appropriate, consistent with statutes and case law, and provides both parties another opportunity to be heard; and (6) OAH is liable to Heid and Herges for damages it sustained in this case.

Thus, this Court should affirm the District Court's Order, dated December 3, 2007, denying OAH's motion to dismiss or for summary judgment thereby allowing this case to proceed to trial on the amount of damages sustained by Heid and Herges.

Argument

On an appeal from summary judgment, appellate courts determine whether (1) there are any genuine issues of material fact; and (2) the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The evidence must be viewed in the light most favorable to the party against whom summary judgment is sought. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Where there is no issue of material fact, this Court reviews the district court's application of the law de novo. Commercial Union Ins. Co. v. Minn. Sch. Bd. Ass'n, 600 N.W.2d 475, 478 (Minn. Ct. App. 1999), review denied (Minn. Dec. 21, 1999).

I. Heid and Herges are entitled to damages as a matter of right.

OAH attempts to argue that Heid and Herges are not entitled to damages, but such assertion is without merit and contrary to controlling law, the District Court's orders, and this Court's decision in OAH Appeal I.

A. The law establishes Heid and Herges' right to recover damages in this case.

The mandamus statutes were intended to provide a cause of action against public entities such as a state agency requiring them to both perform a legally required duty and compensate a party damaged by such failure to perform the duty. See Minn. Stat. § § 586.01 (provides that "a writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."); 586.09 (provides that "a

plaintiff who is given judgment, shall recover the damage sustained, together with costs and disbursements.”). Further, the Minnesota Supreme Court holds that “damages are recoverable as a matter of right” in mandamus actions. Nationwide Corp. v. Nw. Nat'l Life Ins. Co., 251 Minn. 255, 276, 87 N.W.2d 671, 686 (1958) .

Section 586.09, which pertains to damages in mandamus actions, would be rendered meaningless and the purpose of the mandamus statutes would be defeated if a prevailing party could not recover damages against the State of Minnesota or one of its agencies (hereinafter the “State”) if a writ of mandamus is issued against it. See Minn. Stat. § 645.16 (provides that “[e]very law shall be construed, if possible, to give effect to all its provisions.”). The mandamus statutes therefore clearly compel the awarding of damages against the State when a writ of mandamus judgment is issued against it as here - in favor of Heid and Herges.

A clear reading of the express language of Minn. Stat. § 586.09 makes recovery of damages by Heid and Herges mandatory in this case.

1. Heid and Herges are “plaintiff[s]” pursuant to the mandamus statutes.

i. Heid and Herges properly intervened in this case.

Heid and Herges moved to properly and timely intervene in this case pursuant to the governing rules of civil procedure “in support of” the Mandamus Petition. (App. A. at A36, 44). Under Minn. R. Civ. P. 24.01, anyone must be permitted to intervene in an action under the following circumstances: (1) the applicant claims an interest relating to the property or transaction which is the subject of the action; (2) the applicant is so

situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (3) the applicant's interest is not adequately represented by existing parties.

In this case, Heid and Herges sought to intervene on the grounds that they are owners of the Heid and Herges Property, the property requires municipal services from Waite Park in order for their proposed urban residential development to proceed, municipal services are only available with annexation to Waite Park, and their interest in the Heid Herges Property would be impacted by the District Court's disposition of the Mandamus Petition. (App. A. at A40, 43). Further, Waite Park would not have adequately represented Heid and Herges in claiming the damages they sustained. (App. A. at A43). Based on the foregoing, the District Court accepted Heid and Herges as proper intervenors, they have sustained damages, and therefore they may seek recovery for such damages.

ii. Heid and Herges can maintain their own action for damages against OAH.

In finding that an intervenor may seek damages in a civil action in which it intervenes, the Minnesota Supreme Court holds that:

[I]t [the intervenor] could have maintained an original action against defendant for damages, by reason of the alleged injury. Its interest in the property was of such a character that it must necessarily either gain or lose by the direct legal operation and effect of the judgment in this action. . . We see no good reason why all of the issues which can properly be raised between the mortgagors, the mortgagee, and the defendant should not be disposed of in one action.

Wohlwend v. J. I. Case Threshing Mach. Co., 42 Minn. 500, 502, 44 N.W. 517 (1890) .

The Minnesota Supreme Court has similarly held that intervenors may be a prevailing party in interest in lawsuits and therefore entitled to costs and disbursements. See e.g., Muirhead v. Johnson, 232 Minn. 408, 46 N.W.2d 502 (1951) (holding that intervener was entitled to such disbursement as it necessarily incurred or paid as a prevailing party); State ex rel. Bergin v. Fitzsimmons, 226 Minn. 557, 33 N.W.2d 854 (1948) (holding that intervener was entitled to costs and disbursements on appeal as a matter of right as prevailing party).

OAH attempts to argue that Heid and Herges could not have brought a mandamus action against OAH. This allegation is without merit. The case cited by this Court in OAH Appeal I provides in mandamus actions that:

Before a writ of mandamus may issue, the petitioner must meet the standing requirements of Minn. Stat. § § 586.01-.02 (2002). [citation omitted]. To do so, the petitioner must demonstrate that (1) the official has failed to exercise a duty imposed by law; (2) due to this failure, the petitioner is specifically injured by a public wrong; and (3) there is no adequate alternative legal remedy.¹

See (App. A. at A217).

This Court determined in OAH Appeal I that both Waite Park and Heid and Herges demonstrated the requirements for a writ of mandamus to issue and therefore

¹ Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen, 663 N.W.2d 559, 561 (Minn. Ct. App. 2003).

Heid and Herges met the standing requirements necessary to bring a mandamus action against OAH. (App. A. at A217-20).

Though Heid and Herges could have maintained an original action against OAH for a writ of mandamus and damages, they decided to intervene in the Mandamus Petition so that the District Court could dispose of the petition and damages claimed in one action instead of multiple actions. Further, Heid and Herges sought to intervene in support of the Mandamus Petition as their interest in the Heid Herges Property was clearly of such a character that they would either gain or lose by the direct legal operation and effect of the judgment on the petition. (App. A. at A43). Heid and Herges clearly stated the damages sustained in their first pleading in the mandamus action:

By refusing to order annexation of the [Heid Herges Property], [OAH] has wrongly interfered with, delayed, and frustrated Intervenors' development plans. This has resulted in great and continuing expense and damage to Intervenors.

(App. A. at A39-40).

In addition, this pleading also itemized the "time, money, and effort" Heid and Herges expended in reliance upon the Orderly Annexation Agreement. (App. A. at A41-43). This entire case clearly revolves around the Heid Herges Property with most, if not all, of the damages sustained stemming from it.

Based on the foregoing, Heid and Herges are "plaintiff[s]" pursuant to Minn. Stat. § 586.09 entitling them to the damages sustained.

2. Heid and Herges were given judgment in this case.

The District Court entered judgment on the Writ of Mandamus on October 12, 2005. (App. A. at A179). The Writ of Mandamus clearly impacted the Heid Herges Property as it ordered OAH to order annexation of the property to Waite Park to the benefit of Heid and Herges and they clearly suffered public wrongs specifically injurious to them as a result of OAH's failure to perform the act the judgment required them to perform. (App. A. at A166). The District Court held that "[i]n granting the [Writ of Mandamus], [the District] Court effectively gave judgment to all petitioners, including intervening petitioners[, i.e., Heid and Herges]." (App. A. at A13). Heid and Herges, along with Waite Park, are plaintiffs given judgment entitling them to recover damages as a matter of right in this case.

B. This Court and the District Court held that Heid and Herges sustained damages in this case.

In its order directing the issuance of the Writ of Mandamus, the District Court held that Heid and Herges "ha[d] been unable to develop their property as anticipated" due to OAH's failure to order annexation and have "suffer[ed] public wrongs injurious to them." (App. A. at 166). This shows that the District Court already found that Heid and Herges sustained damages that are recoverable from OAH.

In affirming the District Court's Writ of Mandamus, this Court held that:

We conclude that both the City and Heid Herges, along with Regional [Land Holding], were specifically injured by a public wrong. Had OAH properly executed its legal duty under Minn. Stat. § 414.0325, the [Heid Herges] [P]roperty would have been annexed and development initiated. [citations omitted]. OAH prolonged the process causing unnecessary costs, hindered the development of the [Heid

Herges] [P]roperty and growth of the City, and affected the resale value of the [Heid Herges] [P]roperty.

(App. A. at A219-20).

The orders of the District Court and decision of this Court show that Heid and Herges' sustained damages in this case and Section 586.09 establishes their right to recover such damages.

II. OAH is liable for damages caused by its illegal delay in ordering annexation of the Heid Herges property.

The arguments of OAH regarding a purported immunity for a damages claim under Section 586.09 are contrary to current statutory and case law involving the liability of the State for damages. The law clearly provides that the State is liable for damages in this instance and many others.

A. Standard

An order denying summary judgment on immunity grounds is immediately appealable. Mumm v. Mornson, 708 N.W.2d 475, 481 (Minn. 2006). In reviewing an appeal from the denial of summary judgment, this Court must determine whether there are genuine issues of material fact and whether the district court erred in applying the law. Id. When reviewing a summary judgment ruling, this Court must consider the evidence in the light most favorable to the nonmoving party. Id. This Court therefore presumes the truth of the facts alleged by the nonmoving party. Burns v. State, 570 N.W.2d 17, 19 (Minn. Ct. App. 1997). Immunity is a legal question that is reviewed de novo. Id.

A defendant seeking immunity from suit has the burden of proving that it is entitled to the defense. Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997).

B. The mandamus statutes make OAH liable for damages.

Contrary to OAH's argument, Section 586.09 expressly requires recovery of the damages sustained in this case against OAH. Thus, neither the State nor a State agency are immune from damages under the mandamus statutes, and there is no legal support for OAH's claims of immunity.

The mandamus statutes were intended to provide a statutory cause of action against public entities such as a state agency requiring it to (1) perform a legally required duty; and (2) compensate a party damaged by such failure to perform the duty. See Minn. Stat. § § 586.01, .09. A writ of mandamus may clearly be issued to a State agency compelling it to perform a legally required duty. See Minn. Stat. § 586.01; Johnson Bros. Grocery, Inc. v. State Dept. of Highways by Spannaus, 304 Minn. 75, 229 N.W.2d 504 (1975) (affirming trial court's granting of writ of mandamus compelling state agency to perform duty required by law).

A party given judgment on a writ of mandamus "shall recover the damage sustained" pursuant to Minn. Stat. § 586.09. The Minnesota Supreme Court holds that "[u]nder our statute [Minn. Stat. § 586.09], damages are recoverable as a matter of right upon the issuance of a peremptory writ of mandamus." Nationwide Corp., 251 Minn. at 276, 87 N.W.2d at 685. Section 586.09 would be rendered meaningless and the purpose of the mandamus statutes would be defeated if a party given judgment on a writ of

mandamus could not recover damages against the State if a writ of mandamus is issued against it. See Minn. Stat. § 645.17 (provides that the legislature intends an entire statute to be effective and certain). See also Minn. Stat. § 645.44, subd. 16 (providing that the word “shall” in Minnesota Statutes means “mandatory”).

OAH asserts that because it was acting in its sovereign, governmental capacity in failing to order annexation, it has absolute immunity against Heid and Herges’ claim for damages, i.e., the immunity is automatic unless it is waived. This assertion is meritless.

OAH primarily relies upon Minnesota Supreme Court cases published in 1932 and 1939 for its proposition that it is immune from a claim for damages under Section 586.09. Such cases, however, have been superseded by State v. Bentley in which the Minnesota Supreme Court applied a statute containing a substantially similar provision to Section 586.09 and determined that the State was liable to a party for costs and disbursements. 231 Minn. 531, 546-47, 45 N.W.2d 185, 194 (1950) (stating that “[t]he rule is that when the state acts in its sovereign capacity costs and disbursements cannot be taxed against it *except as otherwise provided by law*” and holding that a party property owner was “entitled to costs and disbursements under [section] 117.20 (2)” against the State, which provided that “upon appeal[,] the *prevailing party* shall recover costs and disbursements” (emphasis added)).

The decisions in the cases cited by OAH were based upon the overruled distinction courts made on a governmental entity’s liability for costs and disbursements when it engages “in property and proprietary rights as distinguished from governmental

prerogatives.” State v. Holm, 186 Minn. 331, 332-33, 243 N.W. 133, 133-34 (1932).

See also State ex rel. Bd. of Christian Service of Lutheran Minnesota Conference v.

School Board of Consol. School Dist. No. 3, 206 Minn. 63, 68-69, 287 N.W. 625, 627-8 (1939).

In addition, Fownes v. Hubbard Broadcasting, cited by OAH in support of its immunity claim only dealt with the issue of whether attorney fees are includable as damages under Minn. Stat. § 586.09 – not the issue of immunity. 310 Minn. 540, 246 N.W.2d 700 (1976). Fownes also did not involve a governmental entity.

Over thirty years ago, the Minnesota Supreme Court forthrightly stated: “The modern trend in this country supports our decision to abolish governmental immunity.”

Nieting v. Blondell, 306 Minn. 122, 129, 235 N.W.2d 597, 602 (1975). The Nieting Court further opined that:

One of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their persons, properties, and characters. The logical extension of that interest is that, if harm is wrongfully inflicted upon an individual in such a society, he should have an opportunity to obtain a reasonable and adequate remedy against the wrongdoer, either to undo the harm inflicted or to provide compensation therefore. If the state is properly to serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good.

306 Minn. at 131, 235 N.W.2d at 602-03. (abolishing the tort immunity of the State with respect to tort claims arising on or after August 1, 1976, subject to any appropriate action taken by the legislature).

In immunity cases, a court first determines whether immunity is *available* as a defense. See Villareal v. Independent School District #659, 505 N.W.2d 72, 74-75 (Minn. Ct. App. 1993) rev'd on other grounds 520 N.W.2d 735, 739 (Minn. 1994) (analyzing plaintiff's claim that judicial immunity was not available a defense under his statutory cause of action against a governmental entity). It is not presumed that immunity is *available* as a defense. Immunity may be expressly abrogated by statute. Id. Even if an immunity defense is available, this Court then determines whether it is *applicable*. Id. A defendant seeking immunity from suit has the burden of proving that it is entitled to the defense, i.e, that it is applicable. Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997).

Here, immunity is not even available as a defense for OAH to Heid and Herges' claim for damages. Immunity is not available because the applicable statutory cause of action, Chapter 586, provides that a party given judgment against an entity, such as the State, on a writ of mandamus "shall recover the damage sustained." Minn. Stat. § 586.09. See also Nationwide Corp., 251 Minn. at 276, 87 N.W.2d at 685 (holding that "damages are recoverable as a matter of right upon the issuance of a peremptory writ of mandamus."). The mandamus statutes therefore clearly compel the awarding of damages against OAH because judgment on a writ of mandamus was entered against it in favor of Heid and Herges and Waite Park and immunity is not available nor applicable.

C. The Tort Claims Act does not apply to Heid and Herges' claim for damages under the mandamus statutes.

OAH again inexplicably asserts that they are not liable for damages in this case pursuant to Section 3.736, the Tort Claims Act. Even if it were liable under this statute, OAH asserts that Section 3.736 limits their monetary liability. These assertions are without merit as the Tort Claims Act does not apply in this case.

The statute is entitled "Tort Claims" and therefore it clearly only applies to "tort" claims. In this case, Heid and Herges, along with Waite Park, petitioned the District Court for a writ of mandamus pursuant to Chapter 586. Because the mandamus statutes provide a specific cause of action when a party fails to perform a duty required by law, but does not establish the duty, this case clearly does not involve a tort claim. The Tort Claims Act is therefore inapplicable.

In addition, Minn. Stat. § 3.736, subd. 2 expressly provides that the Torts Claim Act does not apply to this case as it provides:

Claims of various kinds shall be considered and paid only in accordance with the statutory procedures provided. If there is no other applicable statute, a claim shall be brought under this section as a civil action in the courts of the state.

(emphasis added).

Again, Waite Park and Heid and Herges brought their claim under Chapter 586 - not Section 3.736 because the mandamus statutes were the applicable statutes. Section 3.736 specifically adds the caveat that only "[i]f there is no other applicable statute" can a claim be brought under it. Clearly, Section 586.09 is the more specific, applicable statute

expressly providing the cause of action for damages in mandamus proceedings. Thus, Section 3.736 requires that this Court must “consider[]” Heid and Herges’ claim for damages “only in accordance with” Chapter 586, not the Tort Claims Act.

The State, therefore, is not statutorily immune from liability for damages nor do the monetary limits under Section 3.736 apply as Heid and Herges’ claim for damages must be considered and paid only in accordance with Minn. Stat. § 586.09.

D. The State is presumed liable for damages caused by it.

If Section 3.736 were applicable in this case, which it is not, OAH asserts that OAH is not liable under subd. 3 (b) for damages because it allegedly failed to order annexation while exercising a discretionary duty. These allegations are false and unsupported.

Subdivision 1 of Section 3.736 statute provides that:

The state will pay compensation for injury to or loss of property . . . caused by an act or omission of the employee of the state . . . under circumstances where the state, if a private person, would be liable to the claimant.

It is therefore presumed that the State is liable for the damages it causes under this or any other statute so providing. There is a strong trend in the states toward making government liable on the same basis as a private tortfeasor. The Minnesota Supreme Court abolished the tort immunity of the State and its agencies. See Nieting, 306 Minn. 122, 235 N.W.2d 597. See also Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); 21 Minn. Prac., Administrative Prac. & Proc. § 11.05.

While the Tort Claims Act does not apply to this claim for damages, it clearly demonstrates a legislative directive for the state to pay damages for its misdeeds and illegal acts. By analogy, the State is equally liable under the mandamus statute mandating recovery of damages under Section 586.09. To read the mandamus statute otherwise, i.e., affording the State immunity for their failure to perform acts required by law even when a writ of mandamus is issued against it, would render the statute directing the recovery of damages in mandamus actions meaningless. See Minn. Stat. § 645.17 (provides that the legislature intends an entire statute to be effective and certain).

In addition, the discretionary immunity in Section 3.736 asserted by OAH is an exception to the general rule imposing liability upon government and such exception should be interpreted narrowly. See Holmquist v. State, 425 N.W.2d 230, 231 (Minn. 1988); 21 Minn. Prac., Administrative Prac. & Proc. § 11.05.2. All governmental actions involve some discretion, but all discretionary actions, in the literal sense, should not result in immunity. Duellman v. Erwin, 522 N.W.2d 377, 380 (Minn. Ct. App. 1994); 21 Minn. Prac., Administrative Prac. & Proc. § 11.05.2.

Thus, OAH is asserting an exception to a general rule imposing liability for its illegal act. Even if OAH's failure to act involved discretion, it should not result in immunity.

In fact, the statutory discretionary duty exception to the State's liability only applies to planning level decisions – not operational level decisions. Holmquist, 425 N.W.2d at 232. Planning level decisions involve “questions of public policy, that is, the

evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.” Id. Operational level decisions, on the other hand, involve “decisions relating to the ordinary day-to-day operations of the government.” Id. (citations omitted).

In this case, OAH committed an illegal act by failing to perform an official duty clearly imposed by Section 414.0325 to order annexation on or about February 11, 2005, as determined by the District Court and this Court. (App. A. at A162-66, 217-19). Thus, OAH was involved in an “operational level decision” when it received Waite Park’s Annexation Resolution.

Discretionary acts are not subject to mandamus. Hinz v. City of Lakeland, 2007 WL 2481021, at *2 (Minn. Ct. App. Aug. 31, 2007); (Resp. A. at RA26-27). Because the District Court issued and this Court affirmed the Writ of Mandamus, it is clear that OAH was not involved in a statutory discretionary duty when it failed to order annexation.

OAH’s failure to order annexation by February 11, 2005 was not a discretionary duty and was instead a day-to-day duty it was required by law to perform. OAH is therefore clearly not excluded from liability even under Section 3.736, if it arguably were applicable in this case, which it is not.

E. Judicial immunity does not apply to ministerial duties of OAH.

In addition to asserting statutory discretionary immunity under the Tort Claims Act, OAH asserts common law judicial immunity. In the case relied upon by OAH to

support its assertion that judicial immunity applies, this Court held that it only applies outside a courtroom to “proceeding[s] of a *judicial nature* if the *hearing* is before a competent court or before a tribunal or officer clothed with judicial or even quasi-judicial powers.” Villarreal, 505 N.W.2d at 74.

In Villarreal, this Court concluded that judicial immunity did not apply. Id. at 76. This Court reasoned that the plaintiff teacher based his statutory racial discrimination claim under the Minnesota Human Rights Act involving his termination on defendant school district’s conduct “occurring outside the adjudicatory context.” Id. This Court reached this conclusion because his claim stemmed from the school district’s initial decision to terminate him prior to it exercising adjudicatory procedures and powers it possessed under state law. Id. The adjudicatory procedures and powers possessed by the school district in Villarreal are similar to those possessed by OAH under Chapter 414. See Minn. Stat. § 125.12.

Here, OAH was required to order annexation administratively, without a hearing, pursuant to Minn. Stat. § 414.0325 by no later than February 11, 2005. See (App. A. at A162-66, 217-19). The District Court and this Court determined that OAH’s only statutory powers in this case were the ability to “review and comment” and “order” annexation in accordance with the Orderly Annexation Agreement and Minn. Stat. § 414.0325, subd. 1(g). Id. Because OAH failed to order as such, Waite Park submitted its Mandamus Petition requesting that OAH be compelled to order annexation without any hearing as required by Minn. Stat. § 414.0325 and the Orderly Annexation Agreement.

See generally (App. A. at A16-35). Though OAH may commence judicial or quasi-judicial proceedings under Chapter 414, it is prohibited from commencing any of these proceedings under the applicable statute, Section 414.0325, subd. 1., and the facts of this case. Thus, OAH was not exercising nor did they have any authority to exercise a proceeding that was judicial in nature in this case. The Mandamus Petition was “outside the adjudicatory context” and therefore judicial immunity does not apply.

In addition, the Minnesota Supreme Court states that “the three indicia of quasi-judicial actions can be summarized as follows: (1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim.” Minnesota Center for Environmental Advocacy v. Metropolitan Council, 587 N.W.2d 838, 842 (Minn. 1999). “Failure to meet any of the three . . . indicia is fatal to [a] claim that . . . proceedings were quasi-judicial.” Id. at 844.

In this case, there was no disputed claim. All relevant facts were submitted to OAH by Waite Park by U.S. mail and not submitted in a hearing or other contested forum. (Resp. A. at RA11-22). This Court opined that under Minn. Stat. § 414.0325, “no approval” of the annexation was required by OAH following the submission, it only had authority to “review and comment” on the submissions, and it was required to administratively order annexation without a hearing. (App. A. at A217-19). Because the indicia of “quasi-judicial” actions were not met, immunity on such grounds does not apply in this case.

F. Official immunity is not applicable in this case.

OAH also asserts it has official immunity from Heid and Herges' damages claim. The Minnesota Supreme Court held in a 2004 case, Sletten v. Ramsey County, that official immunity only protects "government officials." 675 N.W.2d 291, 299 (Minn. 2004). This claim for immunity therefore only applies to protect "public officials" from personal liability and not the governmental entity itself. Id.

In this case, no government officials are parties to this suit - only OAH - and therefore official immunity can not be asserted by OAH and such immunity does not apply.

G. OAH is not entitled to vicarious official immunity.

The critical issue in official immunity claims is whether an official's act is protected discretionary conduct or unprotected ministerial conduct. See Kari v. City of Maplewood, 582 N.W.2d 921, 923 (Minn. 1998).

In Sletten, the Minnesota Supreme Court held that vicarious official immunity is not available to a governmental entity as follows:

If the activity [at issue] is absolute, certain, and imperative, involving the execution of a specific duty arising from fixed and designated facts, it will be deemed ministerial, and official immunity will not be available.

675 N.W.2d at 304.

To determine the applicability of vicarious official immunity, the Minnesota Supreme Court considers the following: (1) the language of the statute providing for the cause of action; (2) the nature of the claim; and (3) the particular government activity that

is alleged to have given rise to the claim. Id. Based on these considerations, the Sletten Court affirmed a trial court's holding that a governmental entity was not entitled to vicarious official immunity on plaintiff's statutory cause of action, i.e., nuisance. 675 N.W.2d at 304-06. The Court reasoned that the requirements under a conditional use permit (hereinafter "CUP") (i.e., remove grass clippings at least three times per week) and a "Permit-by-Rule" issued by the Minnesota Pollution Control Agency (hereinafter "MPCA") (i.e., the total facility design waste capacity would be 9,000 cubic yards) established ministerial duties of the governmental entity. Id. The entity's failure to follow the requirements in the CUP (i.e., failing to remove grass clippings at least three times per week) and the MPCA "Permit-by-Rule" (i.e., receiving quantities of waste in excess of 9,000 cubic yards) permitted the plaintiff to proceed with a statutory nuisance cause of action against the governmental entity, including the recovery of damages under that statute. Id.

In this case, OAH had no discretion – it was clearly required to order the annexation of the Heid Herges Property within 30 days of OAH's receipt of the Annexation Resolution from Waite Park, i.e., by no later than February 11, 2005, pursuant to the applicable statute, Section 414.0325, subd. 1(g), the Orderly Annexation Agreement, and the Annexation Resolution. Said statute provides that:

[I]f a joint resolution designates an area as in need of orderly annexation, provides for the conditions for its annexation, and states that no consideration by the Director is necessary, the Director *may review and comment, but shall, within 30 days, order the annexation* in accordance with the terms of the resolution.

Id. (emphasis added).

1. The District Court and this Court found that OAH had a clear legal duty to order annexation in this case.

Based on Section 414.0325 as applied to the circumstances in this case, the District Court's order granting the Writ of Mandamus concluded, among other things, that:

[OAH] failed to perform an official duty clearly imposed by law when [it] did not order the annexation of the affected area within thirty days of Waite Park's submission of a Resolution for Orderly Annexation.

(App. A. at A166).

In affirming such order, this Court held that:

Because the resolution for annexation of the property at issue was properly submitted and adhered the provisions of the joint resolution and Minn. Stat. § 414.0325, the district court properly found that OAH had a legal duty to order the annexation of the property. OAH could review and comment on the resolution for the property at issue, but it was required to order the annexation within 30 days.

(App. A. at 219). The District Court and this Court therefore held that OAH had to execute a specific duty, i.e., order annexation, that arose from the fixed and designated facts of the case. Thus, OAH does not have vicarious official immunity.

2. OAH did not have discretion in this case.

In certain instances, OAH has discretion to order annexation or a hearing on requests for annexation under Section 414.0325, subd. 1(g), e.g., competing petitions for

annexation submitted by multiple cities for the same area, a request for a hearing contained in an annexation resolution, or an inappropriately filed submission.

To support its assertion that it had discretion in this case to order a hearing instead of annexation, OAH relies upon City of Wyoming v. Office of Administrative Hearings, 735 N.W.2d 746 (Minn. Ct. App. 2007). That case, however, is different factually than here. In City of Wyoming, there were “competing proposals for annexation [of a singular township] . . . [under] Minn. Stat. § 414.0325, subd. 1 [by a municipality and a township], and Minn. Stat. § 414.031 [by two other municipalities].” Id. at 751. Based on these facts, this Court held that “[w]e read Minn. Stat. ch. 414 to authorize [OAH] to exercise discretion in determining how competing proposals for annexation may proceed in a manner that satisfies the purposes of chapter 414.” Id.

Here, only Waite Park initiated the annexation of the Heid Herges Property on January 11, 2005 by submitting the Annexation Resolution and corresponding information to OAH. (Resp. A. at RA11-22). That resolution contained language identical to the Orderly Annexation Agreement stating that “[OAH] may review and comment, but shall, within thirty (30) days, order the annexation in accordance with the terms of this Resolution.” (App. A. at A127). The only involvement of another party in Waite Park’s annexation request was a written objection submitted by the Township after OAH ordered a hearing. (App. A. at A130-32). This objection did not implicate any other statutorily “competing proposals.” Even if there was such an implication, it is irrelevant in the determination of whether OAH had discretion because it received this

objection after it ordered a hearing and did not order annexation as required by Minn. Stat. § 414.0325, the Orderly Annexation Agreement, and Annexation Resolution. Id. The City of Wyoming case is clearly factually and legally distinguishable from the present proceedings.

OAH's own actions indicate that it did not have any discretion in this case, i.e., not a single document in OAH's file for this matter indicates its reasons for not ordering annexation prior to the date in which it was required to order annexation, i.e., February 11, 2005. (Intervenors' Memorandum in Opposition to Respondent's Motion to Dismiss or for Summary Judgment, dated September 28, 2007, at 25). The only relevant actions of OAH in this case are those that occurred or did not occur prior to that date. OAH did not assert its reasons in the file for this matter for failing to order annexation until over two and one-half months after Waite Park submitted its resolution requesting annexation. See (App. A. at A65-139). Such reasons were stated in a memorandum, dated May 23, 2005. Id. In that memorandum, OAH asserted that it did not order annexation and instead ordered a hearing because there were "ambiguities about the intent of the parties" to require annexation in this case based in large part on the objection submitted by the Township. (App. A. at A71). This Court, however, clearly held that "[t]here is no ambiguity" in the Orderly Annexation Agreement and the Township's objections were "immaterial." (App. A. at A218-19). Because there was no ambiguity in the Orderly Annexation Agreement, the Township's objections were immaterial, and the conditions under Section 414.0325 for annexation were met, OAH was required by law to

administratively order annexation of the Heid Herges property within 30 days of Waite Park's submission.

OAH's past practice also demonstrates that it had no discretion in this case. Since August 1, 1983, the effective date of the language contained in Minn. Stat. § 414.0325, subd. 1(g) requiring OAH to order annexation if the statutory prerequisites were met, OAH and its predecessor agencies have never ordered a hearing, i.e., issued a "Notice of Hearing" within a file, when the following circumstances are present:

(1) an underlying orderly annexation agreement and the municipality's annexation resolution contain the requisite "no consideration by [OAH] is necessary" language under Section 414.0325;

(2) a municipality initiates an annexation by a resolution of that municipality pursuant to the underlying orderly annexation agreement without any corresponding or joint resolution of a township who is a signatory to the underlying agreement;

(3) the resolution does not request a hearing;

(4) there are no competing requests for annexation by other cities who have a statutory right to initiate such proceedings, seeking annexation of the same property; and

(5) the annexing municipality submits the appropriate documentation (e.g., an annexation resolution) to OAH. See (Affidavit of Brandon M. Fitzsimmons In Opposition to Respondent's Motion to Dismiss or for Summary Judgment, dated September 28, 2007, ¶ 4).

All five of these circumstances were present at the time Waite Park submitted its Annexation Resolution to OAH. Thus, OAH's past practice clearly demonstrates that it did not have authority to exercise discretion once Waite Park submitted its resolution requesting annexation.

3. Damages would encourage OAH to comply with its legal duties under Section 414.0325.

OAH wrongfully asserts that the recovery of damages in this case may inhibit the exercise of independent judgment by OAH and its officials. This, however, is not a valid defense to Heid and Herges' right to damages under the mandamus statutes. OAH is not authorized to exercise independent judgment when the law governing its actions expressly prohibits such independent judgment.

In Sletten, the governmental agency asserted the identical defense to the plaintiff's claim for damages under the applicable nuisance statute. 675 N.W.2d at 306. The Minnesota Supreme Court clearly rejected this defense by stating:

Refusing to extend official immunity to Ramsey County under these circumstances would not deter the county's compost workers' performance by focusing 'stifling attention on performance,' [citation omitted] but would rather encourage these employees to comply with governmental permits, operating requirements, and facility design limitations, which were sufficiently certain and imperative.

Id.

Here, awarding Heid and Herges their legally required damages would encourage OAH and its employees to comply with Minn. Stat. § 414.0325 and orderly annexation

agreements entered into between cities and townships as such duty is certain and imperative.

4. OAH has no immunity under the mandamus statutes.

The mandamus statutes clearly provides that “[a] plaintiff who is given judgment, shall recover the damage sustained.” Minn. Stat. § 586.09. Because of OAH’s clear, ministerial duty to order annexation in this case and the Writ of Mandamus issued by the District Court providing as such, Heid and Herges “shall” recover the damages they sustained against OAH. Vicarious official immunity therefore does not apply.

Because OAH does not have any form of immunity for its failure to order annexation when it was legally required to do so, OAH is liable under the mandamus statutes for damages sustained by Heid and Herges.

III. The District Court properly determined it had jurisdiction over Heid and Herges’ damages claim.

OAH’s argument that the District Court lacks jurisdiction over Heid and Herges’ damages claim is without merit and contrary to the governing statute, case law, and orders of the District Court and this Court.

A. Standard

In reviewing the jurisdiction of a court, this Court is guided by the following:

Jurisdiction of the district court over the parties and the subject matter in a case entertained by it will be presumed unless want of jurisdiction affirmatively appears on the face of the record or is shown by extrinsic evidence in a direct attack on the judgment or order.

State ex rel. Great N. Ry. v. Dist. Ct., 227 Minn. 482, 492, 36 N.W.2d 336, 341 (1949)
(emphasis added).

Subject matter jurisdiction involves a court's authority to decide a particular class of actions and its authority to decide the particular questions before it. Cochrane v. Tudor Oaks Condo. Project, 529 N.W.2d 429, 432 (Minn. Ct. App. 1995), review denied (Minn. May 31, 1995). The district court's determination of subject-matter jurisdiction is subject to de novo review. Johnson v. Murray, 648 N.W.2d 664, 670 (Minn. 2002).

B. The District Court retains exclusive original jurisdiction over damages claims in mandamus actions after entering judgment.

Minnesota's mandamus statutes (Minn. Stat. § 586.01 et seq.) provide that "[t]he district court has exclusive original jurisdiction in all cases of mandamus." Minn. Stat. § 586.11. These statutes further provide, in part, that "[a] plaintiff who is given judgment [in a mandamus action], shall recover the damage sustained, together with costs and disbursements." Minn. Stat. § 586.09. Based on the mandamus statutes, the District Court has jurisdiction over the Mandamus Petition, including claims for damages in such action.

Procedurally, the express language of Minn. Stat. § 586.09 provides that only a plaintiff who is first "given judgment" must recover damages. See Nationwide Corp. 251 Minn. at 276, 87 N.W.2d at 686 (holding that "damages are recoverable as a matter of right" in mandamus actions). Pursuant to Minn. Stat. § 586.09, the Nationwide Corp. Court held that "[p]roof [of damages] under the court's judgment may be made at a time

fixed by the court.” 251 Minn. at 276, 87 N.W.2d at 686. In that case, the Minnesota Supreme Court affirmed a trial court’s procedure in awarding damages by stating that:

[The trial] court adopted a practical solution . . . [i.e.,] *the right to a writ of mandamus could be determined before the parties were put to the trouble and expense of proving damages.* . . . Inasmuch as the right to damages is fixed by the statute and defendant is to be given an opportunity to be heard before damages are awarded or assessed, we fail to see how defendant has been prejudiced in any way by the amendment.

Id. (emphasis added).

Contrary to OAH’s argument, a district court does not need to expressly reserve jurisdiction over a claim for damages in a mandamus action. Instead, the Minnesota Supreme Court’s holding in Nationwide Corp. clearly provides that a trial court has discretion to determine when a court will require proof of damages in a mandamus action. 251 Minn. at 276, 87 N.W.2d at 686.

In support of its argument that the District Court lacked jurisdiction, OAH cites to Olson v. City of Lake Elmo, 1993 WL 491254 (Minn. Ct. App. Nov. 30, 1993); (App. A. at 264). This case is inapplicable to this matter because (1) it is an unpublished decision and therefore has no precedential value; (2) the issue of damages in that case involved 42 U.S.C. § 1983 - not Minn. Stat. ch. 586; (3) plaintiff filed a complaint under 42 U.S.C. § 1983 that included a claim for damages under that law - no damages were claimed under Minn. Stat. ch. 586; (4) damages are not mandatory in 42 U.S.C. § 1983 claims – damages are mandatory under Minn. Stat. § 586.09; (5) the trial court granted plaintiff’s petition for mandamus, but did not address her 42 U.S.C. § 1983 claims; (6) plaintiff did

not move for new trial or amended findings based on the trial court's failure to consider her damages claim included in her complaint; and (7) plaintiff's appeal to this Court requested a finding of a 42 U.S.C. § 1983 violation and damages under it, but this Court did not address such a request because the violation and damages under 42 U.S.C. § 1983 were claimed before the appeal commenced without the trial court making a determination on such claims, which would have required an amendment to the underlying judgment to address what the trial court failed to determine. (App. A. at A264).

In this case, OAH commenced its appeal of the Writ of Mandamus on September 22, 2005 and then the District Court stayed enforcement of it pending the appeal on October 11, 2005. (App. A. at A170(a)-(b), 171-75). Thereafter, the District Court entered judgment on the Writ on October 12, 2005. (App. A. at A179). Based on this timing of events, the District Court was only permitted to hear a claim for damages after OAH Appeal I was exhausted. In addition, the status of the Heid Herges Property was not determined until OAH ordered annexation on August 2, 2006. (App. A. at 221). Thus, following OAH's appeal, this Court's affirmance of the Writ of Mandamus, and OAH's order for annexation of the Heid Herges Property, the District Court determined that it would require documentation of the damages claimed by Heid and Herges along with the authority for claiming such damages. See pp. 7-8 supra. Heid and Herges subsequently submitted its claim for damages pursuant to the directive of the District Court. (App. A. at 223-29).

Because Heid and Herges have a right to damages under Section 586.09 and the right to the Writ of Mandamus has been determined, this Court must retain jurisdiction to consider Heid and Herges' claim for damages.

C. The stay of enforcement on the Writ of Mandamus precluded a claim for damages during OAH's appeal of the writ.

When a district court stays a writ of mandamus on appeal, "all proceedings under the order are stayed, and all rights affected thereby saved." State ex rel. Matthews v. Weber, 31 Minn. 211, 212, 17 N.W. 339 (1883) .

Due to OAH's appeal of the Writ of Mandamus, the District Court ordered a stay of enforcement of the writ pending such appeal. (App. A. at A171-75). In the stay order, the District Court held that damages resulting from the stay could be readily determined. (App. A. at A175). The damages could not be ascertained until the stay was relinquished. The District Court would therefore have been precluded from proceeding on Heid and Herges' Amended Claim for Damages and Interest during the pendency of the stay. Further, Heid and Herges' right to "recover damage sustained" under Minn. Stat. § 586.09 was saved during the pendency of the appeal. The District Court's stay of the enforcement of the Writ of Mandamus therefore required Heid and Herges to wait until the appellate process was exhausted and damages from the stay could be determined before proceeding on a claim for damages – which they did.

D. The District Court's process for determining the amount of damages is a fair and practical solution.

OAH asserts that no specific claim for damages was made prior to the entry of judgment on the Writ of Mandamus and that the District Court's process is otherwise unfair. Such an assertion is irrelevant and without merit. The procedure established by the District court for determining damages is fair, appropriate, supported by the governing mandamus statute and legal precedent, and provides OAH a second opportunity to be heard.

First, OAH was on notice by the wording of Minn. Stat. § 586.09 that a plaintiff "shall" recover damages sustained in mandamus actions. Because of this statute, the Nationwide Corp. Court rejected the defendant's contention in that case that the damages in a mandamus action had to be pleaded and proved before entry of judgment. 251 Minn. at 276, 87 N.W.2d at 686. It held that damages did not need to be pleaded and proved before the right to a writ of mandamus is determined because "the right to damages is fixed by the statute and defendant is to be given an opportunity to be heard before damages are awarded or assessed." Id. The Nationwide Corp Court relied on Langan v. Pittson School Dist., 335 Pa. 395, 6 A.2d 772 (1939) in making this holding " 'because of the peculiar nature of mandamus proceedings and the fact that until the writ issued damages would not be ascertained.' " 251 Minn. at 276, 87 N.W.2d at 686; Langan, 335 Pa. at 400, 6 A.2d at 774. Therefore, no specific claim for damages is necessary prior to the entry of judgment on a writ of mandamus.

Second, parties should not be put to "the trouble and expense of proving damages" before the right to a writ of mandamus is determined" by the district court. Nationwide

Corp. , 251 Minn. at 276, 87 N.W.2d at 686. The District Court here also found that its practical solution for proceeding on a claim for damages benefits both parties because “neither party will have to expend time and money on proving or disproving damages until it is determined that a claim for damages can be maintained.” (App. A. at A11). OAH’s argument that the amount of damages should have been proved before the entry of judgment on the Writ of Mandamus on October 12, 2005 would have required Heid and Herges to spend the time, money, and effort on proving damages before the appellate courts disposed of the appeal despite the possibility on appeal that the Writ of Mandamus may be reversed and they would not be entitled to any damages. Thus, it would have been futile and unnecessary for Heid and Herges to claim and the District Court to proceed on such claim for damages prior to exhaustion of the appeal on the Writ of Mandamus. The improper procedure proposed by OAH to show damages is inefficient and futile, especially since this Court has discretion to fix the time in which a party must prove damages in mandamus actions. Nationwide Corp. , 251 Minn. at 276, 87 N.W.2d at 686.

Third, the issue of Heid and Herges’ damages has been stated since they intervened in the mandamus proceedings. For example, Heid and Herges’ first pleading, Intervenor’s Verified Pleading and Statement of Reasons for Intervention, clearly states that:

By refusing to order annexation of the [Heid Herges Property], [OAH] has wrongly interfered with, delayed, and frustrated Intervenor’s development plans. This has resulted in great and continuing expense and damage to Intervenor.

(App. A. at A39-40).

In addition, this pleading also itemized the “time, money, and effort” Heid and Herges expended in reliance upon the Orderly Annexation Agreement. (App. A. at A41-43).

This entire case clearly revolves around the Heid Herges Property with most, if not all, of the damages sustained stemming from it.

Fourth, contrary to OAH’s assertion, Heid and Herges were not required to plead their damages claim prior to entry of judgment as specified in Minn. R. Civ. P. 8.01 because the proper procedure for mandamus proceedings is governed entirely by Minn. Stat. § § 586.01 to 586.12. The mandamus statutes provide for mandatory damages following judgment on a writ of mandamus and the Nationwide Corp. Court has rejected this same argument by allowing a party to claim damages following the entry of judgment on a writ of mandamus without pleading such damages before the entry of judgment. 251 Minn. at 276, 87 N.W.2d at 686. See also State v. Anderson, 239 Minn. 144, 146, 58 N.W.2d 257, 259 (1953). Even if Heid and Herges were required to plead damages as provided in Minn. R. Civ. P. 8.01, the issue is not relevant to the District Court’s jurisdiction nor fatal to Heid and Herges’ claim for damages. Further, OAH has not been prejudiced by any purported failure to specifically plead damages prior to the entry of judgment as (1) Heid and Herges served their claim for damages on OAH and OAH has had and will have opportunities to be heard on such claims; and (2) Heid and Herges are permitted to amend their pleadings in order to plead damages with the consent of OAH or leave of the district court when justice so requires pursuant to Minn. R. Civ.

P. 15.01 or to conform to the evidence at trial pursuant to Minn. R. Civ. P. 15.02 and OAH may respond to such amendments.

Fifth, Heid and Herges continued to sustain damages during the pendency of OAH's appeal and continue to sustain damages. See (App. A. at A223-36). Thus, requiring Heid and Herges to claim and prove damages before such appeal was exhausted and OAH ordered annexation unduly prejudices Heid and Herges entitlement to recover all "damage sustained" under Minn. Stat. § 586.09.

Sixth, OAH unreasonably delayed in asserting immunity in this case, i.e., it was not asserted until after the District Court and this Court upheld the Writ of Mandamus and Heid and Herges commenced their Claim for Damages and Interest. (App. A. at 261-63). Further, OAH did not serve its motion to dismiss or for summary judgment challenging the District Court's jurisdiction and asserting immunity until discovery was completed, 11 months after Heid and Herges' damages claim commenced, and scheduling a hearing on the motion one day before the deadline for a hearing set by the District Court. Id. Because of the unreasonable delay in filing its motion, Heid and Herges engaged in over six months of discovery, expended extensive time and resources of their own and their staff at their business during the work week in responding to OAH's discovery requests, retained and paid an expert for trial, prepared for and participated in a mediation, and were preparing for trial with their counsel. (Intervenors' Memorandum in Opposition to Respondent's Motion to Dismiss or for Summary

Judgment, dated September 28, 2007, at 10-11). Heid and Herges would be unduly prejudiced if the District Court's jurisdiction were lost.

Finally, OAH has had and will have another opportunity to be heard on the damages claimed by Heid and Herges. Following Heid and Herges' submission of their Claim for Damages and Interest, OAH has done or participated in the following proceedings: submitted a responsive memorandum, argued at a hearing, participated in discovery and mediation, and were scheduled for a trial on the amount of damages. See Id. at 7. Such proceedings have and will provide OAH with ample opportunity to be heard on Heid and Herges' damages claim.

The District Court summarized the fair and appropriate process it established for Heid and Herges' damages claim as follows:

It was clearly established in the Court's previous orders that Intervenors' damages are readily ascertainable. . . . Intervenors have established an entitlement to a claim for damages. A further hearing is necessary in order to address the amount of damages, if any, to be awarded to Intervenors.

(App. A. at A260). Because OAH will have a second opportunity to be heard before any damages are awarded, it is not prejudiced by the District Court's procedure for such claim.

E. This Court's affirmance of the Writ of Mandamus does not bar a claim for damages.

OAH asserts that this Court's affirmance of the Writ of Mandamus and order on extending review to the District Court's October 12, 2005 judgment in OAH Appeal I

prohibits Heid and Herges from seeking damages. This assertion is baseless for the following reasons.

The primary issue before this Court on OAH's appeal of the Writ of Mandamus was whether the record supported the issuance of the Writ of Mandamus. (App. A. at A216). A writ of mandamus is issued "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Minn. Stat. § 586.01. In this case, the Writ of Mandamus compelled OAH to order annexation. It did not address the amount of damages sustained by Waite Park nor Heid and Herges because that issue was not before this Court nor the District Court to determine. (App. A. at A157-69). Further, OAH did not address the amount of damages in OAH Appeal I. Finally, this Court's decision on the appeal disposed of the Writ of Mandamus, but did not dispose of the issue of damages as such issue was not before the Court.² Thus, the amount of damages sustained has not been disposed of in this case.

In addition, the amount of damages sustained by Heid and Herges could not be proved by them nor determined by the District Court until a party was first "given judgment" on a Writ of Mandamus. See Minn. Stat. § 586.09 (provides that only a

² OAH's assertion that Minn R. Civ. App. P. 104.02 applies here as a bar to Heid and Herges' damages claim is misguided as the rule only addresses an extension of the time in which to appeal an order made prior to the entry of judgment following a judgment after the insertion of costs and disbursements. Neither of these circumstances are relevant in this case.

plaintiff who is first “given judgment” must recover damages). In Nationwide Corp., the Minnesota Supreme Court affirmed a trial court’s procedure of determining the right of a party to a writ of mandamus before the parties were put to the trouble and expense of proving damages. 251 Minn. at 276, 87 N.W.2d at 686. The Nationwide Corp. Court additionally permitted a claim for damages to proceed following its affirmance of the writ of mandamus without a remand.

OAH relies on dicta from irrelevant and immaterial cases to support its assertion that a claim for damages can not be sought following a final decision by an appellate court in an action.

In Mattson v. Underwriters at Lloyds of London, the Minnesota Supreme Court merely held that a district court has no jurisdiction to reopen a judgment to allow a party to argue alternative legal grounds to challenge it after affirmance on appeal. 414 N.W.2d 717, 718 (Minn. 1987). See Johns v. Harboarge I, Ltd., 664 N.W.2d 291, 296 (Minn. 2003) (finding that Mattson was inapposite in case in which the district court concluded that it retained jurisdiction to enforce a final judgment after an appeal is complete).

Here, Heid and Herges are not seeking to reopen judgment and they are not challenging District Court or this Court’s judgment. Instead, Heid and Herges are seeking a separate determination on the amount of damages, which is required to occur after being given judgment on the Writ of Mandamus pursuant to the governing mandamus statute, Minn. Stat. § 586.09. The decision and the dicta in the decision cited by OAH in its brief has no bearing in this case.

In Georgia Pacific Corp. v. Gypsum George's Cash & Carry Bldg. Materials Inc., the Court of Appeals denied a party's trial on claims for prejudgment interest where the trial court's orders appealed from addressed and ruled upon the issue of prejudgment interest. 346 N.W.2d 691 (Minn. Ct. App. 1984).

Here, the amount of damages and prejudgment interest were not addressed by any party, not ruled upon by the District Court, and not determined by this Court prior to judgment on the Writ of Mandamus as the mandamus statutes require that judgment on a writ of mandamus be given before the amount of damages can be determined. Thus, the Georgia Pacific Corp. decision cited by OAH is inapposite in this case.

Because the Writ of Mandamus was not finally disposed of in this case until this Court issued its decision and such decision was not appealed, Heid and Herges could not claim damages until such events occurred. The District Court also issued a stay on the Writ of Mandamus pending the outcome of the appeal and therefore the District Court would not have addressed the issue of the amount of damages sustained until the appellate process was exhausted. (App. A. at A171-75). In addition, this Court determined the rights of the parties to a writ of mandamus before the parties proved damages by affirming the Writ of Mandamus. Thus, a claim for damages may proceed without a remand in this case as in Nationwide Corp.

A district court also retains jurisdiction over collateral issues that do not modify the decision being appealed, even after the court of appeals issues an affirmance of the decision without a remand. Kellar v. Von Holtum 605 N.W.2d 696, 700 (Minn. 2000).

In Kellar, the Minnesota Supreme Court concluded that a district court retained jurisdiction to hear motions for attorneys' fees and costs after an appeal resulting in an affirmance without a remand of a district court's summary judgment decision and dismissal of claims. Id. The Court reasoned that "there is likely to be little, if any, harm caused by waiting to resolve such collateral issues until the merits are resolved." Id. In this case, no directive or remand from the Court of Appeals was necessary in order for Heid and Herges to claim damages.

Consideration of damages by the District Court is proper as it previously determined OAH's violation of the law resulted in damages to Heid and Herges and they have timely brought their claim for damages following the final determination by this Court on the Writ of Mandamus. The District Court therefore has jurisdiction over Heid and Herges' damages claim.

Conclusion

The foregoing demonstrates that Heid and Herges are entitled to a claim for damages under the mandamus statutes over which the District Court has jurisdiction. OAH is liable for the damages sustained by Heid and Herges as a result of OAH's illegal delay in ordering annexation of their property required by law. Immunity for OAH on Heid and Herges' damages claim is neither available nor applicable in this case.

Heid and Herges therefore respectfully request that this Court affirm the District Court's Order, dated December 3, 2007, denying OAH's motion to dismiss or for

summary judgment thereby allowing this case to proceed to trial on the amount of damages sustained by Heid and Herges.

Respectfully Submitted,

FLAHERTY & HOOD, P.A.

Dated: February 27, 2008

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